Case Numbers: **3308797/2022**

EMPLOYMENT TRIBUNALS

Claimant: Mr J Kofkin

Respondent: Warburtons Limited

Heard at: Watford (in public; partly in person and partly remote)

On: 19 to 22 February 2024

Before: Employment Judge Quill
Ms A Brosnan
Mr N Boustred

Appearances

For the claimant: Mr K Zaman, counsel

For the respondent: Ms I Ferber KC

JUDGMENT and reasons having been given orally on 22 February 2024, and written reasons having been requested after the hearing in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided

LIABILITY REASONS

Introduction

1. The Claimant is a current employee of the Respondent. He is employed as a driver and has a disability which is admitted by the Respondent.

2. The complaints arise from the Respondent's changes to its delivery schedule in 2021 and the consequences that had for the Claimant. There are also allegations of victimisation.

The hearing

3. The hearing took place entirely in person, save that the Claimant attended by video throughout. Two of the other witnesses observed parts of the hearing remotely.

Documents & Evidence

4. We had an agreed bundle of 615 pages, to which was added pages 616 to 618 and page 247A.

5. We had 7 written witness statements.

6. For the Claimant:

   6.1 Claimant

   6.2 Caroline Huckett

   6.3 Derek Arridge

   6.4 Stephen Hartgrove

7. The Claimant gave evidence by swearing to his statement and answering questions from other side and from panel. His evidence was given remotely. His evidence was by video.

8. Ms Huckett was ready and able to give evidence. That would have been by video. The Respondent had no questions for her on liability and nor did panel and so her written statement was given the same weight as if she had formally sworn to it.

9. Mr Arridge and Mr Hartgrove did not attend. We have given their written statements such weight as we see fit in those circumstances.

10. For the Respondent:

    10.1 Gareth Shaw, distribution site leader

    10.2 David Scott, head of distribution – South

    10.3 Wayne Bishop, driver operations team manager

11. They each gave evidence by swearing to their statement and answering questions from other side and from panel.

12. In addition to the evidence, on Day 1, we were supplied with a cast list, a chronology and an opening note from the Respondent.

13. On Day 3, each side gave us written submissions prior to our hearing their oral submissions.

The Claims and The Issues

14. In around March 2023, the parties had agreed the following the list of issues [Bundle 88 to 91], which was supplemented by the Claimant's further information and the clarification of that further information [Bundle 92 to 100]

Disability Discrimination

1. The Claimant avers that his Generalised Anxiety Disorder amounted to a disability. Did this impairment have a substantial and long-term adverse effect on the Claimant's ability to carry out normal day-to-day activities?

2. Did the Claimant have a disability at the material time? The Claimant avers that the "material time" was from 22 July 2021 to 6 June 2022.

3. Did the Respondent know or ought reasonably to have known that the Claimant was disabled?

Reasonable adjustments

4. Does the Respondent's route rationalisation of a seven-day delivery schedule with different routes everyday amount to a PCP?

5. If so, did this PCP place the Claimant at a substantial disadvantage in the workplace when compared to those not suffering from the Claimant's disability?

6. If so, did the Respondent know, or ought to have known, that the Claimant was placed at a substantial disadvantage by the PCP?

7. If so, did the Respondent take such steps as it was reasonable to take to avoid the disadvantage?

Delay in implementing adjustments

8. Between 21 September 2021 and 11 February 2022, did the Respondent fail to take such steps as was reasonable to avoid the disadvantage by failing to consider the following adjustments

a. a stress risk assessment;

b. routes with fewer calls;

c. restrictions on picking goods in hot and humid environments; and

d. having a fixed route.

Failure to maintain the adjustments

9. The Claimant avers that at some point between 21 March 2022 and 12 April 2022, the adjustments referred to in paragraphs 8a-d were removed from the Claimant. Did the Respondent fail to take such steps as it was reasonable to take to avoid the disadvantage by removing the adjustments referred to in paragraphs 8a - d?

Stage one AMP warning

10. Did the Respondent operate a PCP of requiring employees to attend work to a certain level in order to avoid receiving a stage one warning, which placed the Claimant at a substantial disadvantage?

11 . Did the Respondent know, or ought to have known, that the Claimant was placed at a substantial disadvantage by this PCP?

12. Did the Respondent have a duty to take such steps as it was reasonable to take to avoid the disadvantage? The Claimant avers that the Respondent could have avoided the disadvantage by declining to give the Claimant a stage one AMP warning.

Indirect disability discrimination

13. Did the Respondent apply the PCP of a route rationalisation of a seven-day delivery schedule with different routes every day?

14. If so, did this PCP apply to person with whom the Claimant does not share the protected characteristic of disability?

15. If so, does this PCP put, or would put, people with whom the Claimant shares the characteristic at a particular disadvantage when compared with persons with whom the Claimant does not share it?

16. Has the Claimant been placed at that disadvantage? The Claimant avers that his disability means that the Claimant requires consistency and structure in the routes he is required to complete.

17. If so, can the Respondent show that it is a proportionate means of achieving a legitimate aim?

18. What is the legitimate aim? The Respondent relies on the need to meet customer needs at a time when the country was and is facing a major driver shortage as a legitimate aim.

Discrimination arising from disability

19. Did the Respondent's decision to issue the Claimant with a stage one AMP warning amount to unfavourable treatment?

20. If so, was this unfavourable treatment because of something arising in consequence of the Claimant's disability? The Claimant avers that did this arise in consequence of the Claimant's disability because the Claimant was absent from work because of his disability, meaning it is more likely to need time off work. The Claimant further avers that the absence was caused by the Respondent's delay in implementing the reasonable adjustments which the Claimant required.

21. Can the Respondent show that the treatment was a proportionate means of achieving a legitimate aim?

22. What was the legitimate aim? The Respondent relies on the need for employees to provide regular attendance at work and/or to record accurately absence levels among it employees and/or to support employees under the Attendance Management Procedure who may have absence as a legitimate aim.

Victimisation

23. Has the Claimant done a protected act? The Claimant avers that the following amount to protected acts:

a. the informal grievance made to Ms Nash on 21 February 2022; and

b. the formal grievance raised on 21 March 2022.

24. Was the Claimant subjected to a detriment? The Claimant avers that the following amount to protected acts:

a. The Respondent's decision to issue the Claimant with a stage one AMP warning on 30 March 2022; and

b. The Respondent's decision to refer the Claimant to Occupational Health again on 6 June 2022.

25. Were these detriments because of the protected act?

Time Limits

26. Have any of the Claims been brought out of time?

27. If so, do they form part of a continuing act?

28. If not, would it be just and equitable to extend time?

Remedy

29. Is the Claimant entitled to compensation for loss of earnings?

30. Is the Claimant entitled to compensation for injury to feelings? If so, how much?;

31. Is the Claimant entitled to interest?

32. Is it just and equitable for the Tribunal to make a recommendation(s)?

33. The Claimant seeks the following recommendations:

a. Within a specified period, the Respondent ensures that the reasonable adjustments of a stress risk assessment, the Claimant be placed on a route with fewer calls, restrictions on picking goods in hot and humid environments and having a fixed route.

b. Any other recommendation that the Tribunal finds is just and equitable.

Clarifications to the list of issues during the hearing

15. We did not need to address issues 1 to 3, because the Respondent conceded them.

16. We did not need to address issues 23a and 23b, because the Respondent conceded that they were each protected acts. It did not concede that Don Marrese was aware of either act (at any relevant time). It conceded that Adrian Armstrong was aware of both (at all relevant times).

17. The Respondent agreed with the description of the PCP at paragraph 4 of the list of issues. It also agreed that the Claimant's disability meant that he required consistency and structure in the routes he was required to complete:

18. For paragraph 10 the list of issues, the Respondent relied on the contents of the Attendance Management Policy ("AMP") which includes discussion of, amongst

other things, “Stages of the Attendance Management Procedure” including “Stage 1”. The Claimant’s specific formulation of the PCP was not conceded.

19. For paragraphs 5 and 11, without conceding disadvantage, the Respondent accepted that if the Tribunal decided that there was disadvantage, no issue arose as to whether the Respondent knew, or ought to have known, about such disadvantage.

20. The Respondent agreed with the description of the PCP at paragraph 13 of the list of issues. It also agreed, as per paragraph 14, that this PCP was applied to all delivery drivers, regardless of whether or not they shared the Claimant’s protected characteristic.

21. For paragraphs 19 and 20 of the list of issues, there is no dispute about the Claimant having been given a letter dated 30 March 2022, or about the contents of the letter. There is also no dispute that (i) his absence from September 2021 to February 2022 was a cause of that letter or (ii) that that absence was something which arose in consequence of his disability. There *is* a dispute about how the Claimant characterises the contents of the letter, and whether it was unfavourable treatment.

Time Limits

22. ACAS conciliation was 15 April to 26 May 2022.

23. A claim form was presented on 23 June 2022. [Bundle 11]. At Box 8, it alleged

> Discrimination Arising from Disability.
>
> Failure to make reasonable adjustments
>
> Indirect Discrimination
>
> Victimisation

24. It included a Grounds of Complaint document [Bundle 23]. That contained details of the Claimant’s start date and his disability. As part of the allegations in relation to complaints of each of (i) indirect discrimination and (ii) failure to make reasonable adjustments, it alleged a PCP:

> The Claimant contends that (the Respondent Imposed a provision, criterion or practice ("PCP”) which put the Claimant and those persons with the. Claimant's disability at a detriment. In particular, the Respondent required that the Claimant achieved a certain level of attendance In accordance with the Attendance Management Policy.

25. It also alleged that a reasonable adjustment would be to allow the Claimant more absences prior to Stage 1, and/or to apply discretion and disregard any disability-related absences.

26. Other than just stated, nothing in the Grounds of Complaint was relevant to the issues which we had to decide. In particular, a mistake had been made when the Claimant presented the claim; an incorrect Grounds of Complaint document was submitted. The Grounds of Complaint document submitted described the Claimant's earlier claim against the Respondent. All the complaints in that document had been disposed of when the earlier litigation concluded, and it would have been an abuse of process to seek to revive them.

27. The version of the Grounds of Complaint that is relevant to this claim (and upon which the list of issues set out above is based) was at [Bundle 56]. By decision of EJ Warren sent to parties on 12 November 2022 [Bundle 64], that new Grounds of Complaint was accepted as an amendment to the claim. It was treated as having been received by the Tribunal on 22 July 2022, and the Respondent concedes that is the correct date. Furthermore, the Respondent concedes that the date of presentation of the complaints in that document should be treated as 22 July 2022 (and not 12 November 2022, or 24 August 2022, or any other date later than 22 July 2022).

28. The Claimant does not necessarily concede that the presentation date is later than 23 June, but in any event relies on the just and equitable extension to the extent that it is necessary to do so.

The Findings of Fact

29. The respondent's is a bread and bakery products manufacturer.

30. It has around 21 bakeries around the country. It employs primary drivers to drive large vehicles.

31. It also employs secondary drivers such as the claimant to drive smaller vehicles which take bread from bakeries to the Respondent's customers.

32. The Respondent's customers are retailers who sell to the public, including independent stores as well as several very large and well known supermarket chains.

33. One of the bakery locations was Enfield, which is were the claimant was located.

34. The Claimant's employment commenced in July 2018.

35. The respondent accepts that the Claimant has a disability, namely generalised anxiety disorder and that it has been aware of that at all relevant times.

36. Prior to the time period relevant to this dispute, the claimant had brought a previous employment tribunal claim against the respondent which had resulted in a without admission of liability settlement agreement. That settlement was in around 2020.

37. The claimant's own immediate line managers were the Driver Operations Team Managers based at Enfield There were around seven of these when the Respondent was fully staffed.

38. One of the Driver Operations Team Managers was Wayne Bishop who was the claimant's line manager at all times relevant to this dispute .

39. Another Driver Operations Team Managers was Don Marrese.

40. Any Driver Operations Team Manager might potentially allocate routes to particular drivers, or deal with HR issues such as approving annual leave requests or conducting return to work interviews. Which Driver Operations Team Manager would carry out these tasks depended who was on duty at the relevant time.

41. There were intended to be around 110 or so secondary drivers at Enfield if fully staffed. Each of the Driver Operations Team Manager had a specific allocation of a proportion of those drivers for whom they were the nominated line manager. However, other than conducting the annual reviews for those particular drivers, there was, in practice, little difference day to day between the responsibilities which the Team Managers had towards their own direct reports, and towards the other drivers on duty that day.

42. The Driver Operations Team Managers reported to Gareth Shaw, who was Distribution Site Leader, Enfield

43. Mr Shaw reported to Mark Tasker Distribution Site Leader, Enfield.

44. Mr Tasker reported to Darren Bond Distribution Operations Director.

45. The respondent's head office is in Bolton and the Strategy and Planning team was located at head office. The Head of Strategy and Planning was Jim Norton, at the times relevant to this dispute.

46. We accept that the staffing levels for the secondary drivers between August and December 2021 is as shown on [Bundle 452] in a document Mr Shaw produced around that time. It does not show July, but at the start of August, they had 7 vacancies, and for the remainder of the period it was in excess of 20.

47. While Enfield always had vacancies, the number it had between 9 August 2021 and the end of 2021 was higher than usual.

48. We also accept that the absence levels shown on the same document for the same period are reasonably accurate. It is broken down by week, rather than by day. On a daily basis, rather than a “normal” absence rate of around 3%, typical absence rates that that time ran closer to 12%. The covid pandemic was still causing absences: some because the driver had actually tested positive for covid; others because they had to isolate for some other covid-related reason.

49. The UK was experiencing a national driver shortage as of July and August 2021. Many employers had vacancies for drivers which could not be filled. This national situation meant that the Respondent was unable to fill all its own vacancies, and that the Respondent struggled to obtain agency cover (for the vacant posts, and for the absent drivers).

50. The claimant had a period of sickness absence for around 10 months until July 2021.

51. During that absence the respondent obtained occupational health reports, including those in April 2021 [Bundle 168], which discussed reasons for absence to date (which were not all disability related) and included:

> Time frame when he may be fit to return to his duties as a vocational driver is a subject of his improvement to the level when his symptoms are adequately controlled with no side effect from medications reported. He would need to achieve at list some period of stability when he is free from symptoms and I am thinking at least about 4-6 weeks as a minimum feeling well before we assess him as fit to return in the work place.
>
> I would suggest for you as his employer to consider another OH review of his fitness not earlier than 6 weeks' time to monitor his progress and that time depending on how he is feeling I will be in better position to advice you further on his fitness and his occupational prognosis.
>
> Resolving of existing work issue will support his recovery from mental health symptoms.

And

> I have reviewed an additional query where you are asking about particular work place adjustments for Mr Kofkin.
>
> At present time I am not able to recommend any as he is not fit for work. As I expect improvement in his symptoms with an adequate treatment including medication and counselling (talking therapy) as I have suggested in chapter advice on health issues of my report I hope will be able address your questions on my next review.

52. Another report was in June 2021 [Bundle 186]. It included:

> Advice on fitness for work.
>
> Based on the information available today, due to his symptoms and potential side effects from medication, and your queries in relation to what further support and treatment he may need for his health, I recommend we approach his treating doctor for updated medical Information In relation to his treatment plan, prognosis and associated timeframe. Due to associated time and coat resources, we await your direction on whether you wish to proceed with this.
>
> At the present time due to the safety-critical nature of his work, I would be concerned about him returning to work

And

> Specifically, Mr, Kofkin described some perceived work-related difficulties with regards to the clarity of his role/ role expectations and work demands when he Is working In a hot environment he reports panic symptoms and feeling hot, especially when doing "picking" duties",

And

> Subject to any licensing updates or restrictions from the DVLA, Mr. Kofkin perceives that he would benefit from:
>
> - Working on a fixed route
>
> - Flexible working
>
> - Assistance with picking workload.
>
> And
>
> I would encourage that during these discussions a Stress Risk Assessment Is undertaken, using a suitable tool such as the 'Management Standards', In this way management can be sighted in more detail about the specific ways In his role caused him to feel anxiety symptoms and, In turn, what management interventions you might be able to make to address these. I am commenting In general terms and whether any given measure is considered reasonable or not by management Is an organisational matter - rather than a medical one - and will depend on your operational circumstances.

53. Those occupational health reports stated that, at the time each was written, the claimant was not well enough to return to his duties.

54. The claimant was able to commence a phased return to work in July 2021.

55. Around the same time as the claimant was returning to work he put in a flexible working request and he made clear that this was a request for a reasonable adjustment under the Equality Act 2010 ("EQA"), on account of disability, as opposed to being a request which relied solely on any general contractual or statutory right to request flexible working. The Claimant requested that, once his phased return was completed, he would work Sunday to Wednesday each week with Thursday to Saturday as rest days.

56. Mr Shaw met the Claimant and discussed the flexible working request.

57. Paul Daniel, Health, Safety & Environmental Manager, met and communicated with the Claimant in relation to the stress risk assessment. [Bundle 209]

58. The Claimant's return was 22 July 2021, and it was intended at the time that he would be the "route owner" for what was known as "route 752"

59. Traditionally, the respondent had offered a service to its customers that meant it was willing to deliver seven days each week and most of its customers (other than some small independent stores) received deliveries seven days a week.

60. Because it operated this business model, the Respondent was able to have a system of predictable routes for some of its drivers, whereby some drivers would deliver to the same locations every day, and usually in the same sequence.

61. It had around 59 routes from Enfield at the time. Although some of the routes included some smaller stores (and so had some variation depending which of those were receiving a delivery on a particular day) there were routes available

with no such stores and which therefore were entirely predictable for each of the 7 days in the week.

62. The pattern of work for a full-time secondary driver at Enfield was that they would drive four days on, and two days off. They would therefore potentially be on duty on any one of the seven days in a week.

63. “Route owners” drove only one route. They were allocated to a particular route and drove that route every time that they were on duty.

64. On the two days out of six, when the route owner was not on duty, a relief driver would drive the route instead.

65. Relief drivers were employees of the respondent who, instead of being a “route owner” were specifically relief drivers.

66. Where a route owner was unexpectedly absent (for example, because of sickness), the intention was that a relief driver could be used.

67. Agency drivers were also used when needed if the aggregate of route owners and relief drivers would not be sufficient to cover all the routes on a particular day.

68. In addition to the planned routes, on some days, on some routes, because of the quantity of product that had been ordered by the customers on that day for that route, there would be too much volume to all be taken by one vehicle. So, the team managers would create extra runs. They would use their skills and expertise and managerial discretion to decide which “calls” should be removed from overloaded routes, and how those “calls” would be repackaged to a “run out” route.

69. A “call” was the terminology for a specific delivery to a specific customer. A “run out” route was an ad hoc route created on that particular day.

70. During July 2021, it became apparent to the respondent that, because of having insufficient drivers on duty per day, including agency drivers, it was not able to deliver all of the orders which had been placed by its customers.

71. It began discussing what emergency measures could be put in place to address this. This included the measures discussed in Mr Norton's 16 July email to Mr Shaw [Bundle 473].

    71.1 A decision was made to indefinitely reduce the number of deliveries on a Sunday. At that stage, the specific cancellations were attached in a spreadsheet that was sent to Mr Shaw.

    71.2 The same email discussed other shorter term measures.

    71.3 The hope was that by reducing the number of drivers required on the Sunday there would be a higher chance of completing the orders for the remainder of the week.

72. The number of failed deliveries was a major concern for the respondent. Some of its major customers expressed significant concern to the respondent at a very senior level. The Respondent's head office thought that there was a realistic risk of losing major customers, which in turn might threaten the viability of the business.

73. On 21 July, Mr Norton sent out a plan that would involve standing down (a different) 11 routes every day at Enfield. The particular routes that would not run on a given day would be pre-planned in advance. This was based on an estimate of the average number of drivers likely to be available.

    73.1 The routes were not being stood down because the respondent expected that it would have a surplus of drivers, and did not need drivers for those routes. It was the opposite. The Respondent had decided that there was a need to tell customers in advance that they would not be getting a delivery and that by planning the stand downs in advance that could be done. The customers could, for example, then order extra for an earlier day if they wished to do so.

    73.2 The correspondence acknowledged that since they were making plans (to pick which routes, and how many, would be stood down around two weeks in advance) based on averages and projections, there might still be some days on which they did not have enough drivers and they still had to unexpectedly still cancel some of the routes. Likewise, it was not impossible that there would be some days when it turned out that they could have operated some of the routes which had been stood down.

    73.3 However, as of 21 July 2021, head office had decided that this was the best short term plan; it was in the business's best interests to try to avoid disappointing customers with unexpected and unplanned cancellations, and, to do that, they needed to plan to make fewer calls than they had previously been making (and fewer than the number for which there was customer demand).

    73.4 The plan envisaged that there would be a rolling two week schedule of deciding which routes would be stood down in two weeks' time.

74. This standing down of routes continued into August. [Bundle 519]. Some routes were still being stood down after August as the emails from September and October demonstrate.

75. In around late July 2021, the respondent developed what it intended would be a longer term solution to the driver shortage issue. It decided that it would no longer offer its customers the opportunity to receive deliveries on each of the seven days in a week. Instead, they would be able to receive orders three days per week.

76. For Enfield this meant that - rather than having fixed routes which would be unaltered on each one of the seven days of the week - it would move to a system where the routes from Enfield would potentially be different on each one of the seven days in a week.

77. The respondent has accepted in its grounds of resistance that this meant that the routes were unpredictable in advance. Mr Shaw's evidence, which we accept, was that it resulted in 300 possible routes being used. Instead of it being 59 routes which were more or less the same each day, different combinations from the 300 possible routes were used on different days.

78. The respondent accepts that it did not consult with individual drivers or unions about implementing this change. It imposed the change immediately because it believed that it had no choice other than (i) to implement this change and (ii) do so immediately. Its belief at the time was that any delay risked loss of customers and potentially threatened its existence.

79. Mr Shaw sent a letter to all drivers, including the claimant around 19 July 2021. [Bundle 208]. Mr Shaw describes this as a thank you letter. In any event, our finding is that this was sent prior to the respondent's decision to change the route allocation system and that is why it makes no specific reference to that. It does refer to the driver shortages which the respondent was, at the time, considering and seeking to address.

80. Similarly, when Mr Shaw met the claimant on 22 July [Bundle 211], there was no specific discussion about the change described above (that has been referred to as “route rationalisation” during this hearing). The reason that it was not discussed is that the programme had not been decided upon as of 22 July 2021.

81. At the meeting, Mr Shaw’s genuine opinion was that there was the potential for the claimant to have route 752 and the discussion was mainly about his flexible working request. Mr Shaw did not deliberately conceal any relevant information from the claimant during that meeting.

82. A further meeting took place on 19 August 2021. [Bundle 217]. As of that meeting routes 710 and 752 were both believed to be available for the Claimant and were discussed as possible permanent solutions for the claimant once his phased return to work had concluded.

    82.1 Following the Claimant’s return to work, there was a period when route 752 was regularly available to him (paragraph 16 of the claimant's witness statement).

    82.2 Once route rationalisation was implemented route 752 disappeared.

    82.3 Our inference is that route rationalisation had not been implemented by 19 August 2021. The Respondent’s witnesses are mistaken to think it was implemented in July.

83. On the balance of probabilities, route rationalisation was implemented towards the end of August, and no later than the first day or two of September.

    83.1 [Bundle 593] is a text message exchange between the Claimant and Mr Shaw on 26 August 2021.

83.2 It is clear from that, that as of 26 August, the claimant was aware that 752 was removed and might not come back. The claimant was aware of some, but not all, the details of route rationalisation.

83.3 The same is true of Mr Shaw. He replied the same day to say that he had not yet seen the details of the new routes.

84. As both Mr Shaw and Mr Bishop recalled in their oral evidence, one of the routes that was available after route rationalisation was a route which combined three routes which the claimant was familiar with, being Routes 710, 711 and 752.

84.1 This new route had approximately 30 customers in total on it. That is, if a particular driver had been allocated to this route, then that driver would not have to go to any other customers apart from those 30. However, the driver would not go to all 30 on any given day.

84.2 On Monday, Wednesday and Friday, they would go to one subset from the 30 customers. They would be likely to do these same calls in the same order on each of those days.

84.3 Meanwhile on Tuesdays, Thursdays and Saturdays, they would go to the remainder of the customers for that route. Again they would be likely to do the calls in the same sequence on each of those days.

84.4 Sundays were unpredictable and were decided on a case-by-case basis.

85. Each of Mr Bishop and Mr Shaw had discussions with the claimant about this possible route, but neither of them have any clear recollection about what was decided. Neither of them has any clear recollection that the claimant was specifically offered the route and the chance to do that route all of the time, and neither of them has any recollection about any objections or queries or problems that the claimant raised.

85.1 We accept Mr Shaw's account that in the course of more than one conversation with the claimant (and he particularly recalls a detailed discussion held via Teams while he was in his hotel room), he discussed the ins and outs of this route with the claimant.

85.2 Mr Bishop's recollection is that he arranged for the claimant to go out and drive the route with other drivers so that the claimant could potentially become familiar with it.

86. On Thursday, 2 September, at 12:52pm, the claimant text sent a text message to Mr Shaw to say that he would not be able to work with the new arrangements. [Bundle 593], or not straight away at least. He asked for authorised unpaid absence, proposing that his next shift would be Thursday 9 September. Mr Shaw said that if he was not fit for work, then he would need to take the absence as sickness.

87. The text exchange continued. [Bundle 221]. At 3.43pm, the Claimant asked: "*Have you seen all my occ health reports?*"

88. Between that message and the next one, Mr Shaw and the Claimant spoke. This may well be the Teams call that Mr Shaw remembers took place (or it might have been by phone, as he suggested in his written statement). Either way, he gave the Claimant some details of the new route that included the calls that had previously been on Route 752. After the oral discussions, the Claimant sent a further text at 4.57pm:

> What's the picking like? I feel like it's take it or that's it even if it causes me more harm than good.

89. "Picking" referred to the requirement for the drivers to potentially load some of the products onto their vehicle prior to going out at the start of the route. It was a requirement which placed the claimant at a disadvantage because of his disability as the hot and humid environment had the potential to cause panic attacks or distress. The June 2021 OH report had commented on this.

90. The claimant's text messages early the following morning, 3 September, prior to the time he was due to start his shift relate to the fact that he was unable to work that day 3 September. [Bundle 223]. Those texts confirm that there had been a discussion about a particular route. The claimant was going to attempt to familiarise himself with the route to see whether it would be suitable for him by driving it with his partner. He must therefore have been provided with a map and/or other details of customers on that route.

91. His message on [Bundle 224] was sent a few days later and referred back to Friday, 3 September. It spoke about the claimant's intention to be back at work on Thursday, 9 September and to try out the route that day. He made a request that his union representative would drive it with him.

92. We note the text message on [Bundle 225]. There is no electronic datestamp on the page, but the parties have handwritten 7 September 2021. The message implies that the claimant had been given a shift on the day of the message, but it was, not the one he had expected.

93. However, we treat the account given in paragraph 27 of the claimant's witness statement as accurate.

> After my panic attack on 3 September 2021, when I went back to work, my next shift back was on 9 September 2021. I was then given a completely different route that I had never done before. On 10 September 2021, I was given another new route.

94. Thus the text on [Bundle 225] was no earlier than 9 September, and probably was on 9 September. He had been given information about a particular route on or before 3 September, but on his return on 9 and 10 September 2021 he realised that he had not been given that route on those days.

95. The witnesses in the hearing were giving evidence about events more than 2 years earlier. There was a genuinely poor recollection of the specific dates of events and sequence of events in the period July to September 2021.

96. After 9 and 10 September 2021, the claimant had a period off work for reasons unrelated to his disability. He was due back at work on 21 September 2021, but was unable to return.

97. He remained absent from 21 September 2021 to 15 February 2022.

98. During the period of his absence, there were meetings between him and Mr Bishop and between him and Mr Shaw. We have some notes in the bundle. The claimant was accompanied to these meetings by his union representative, and on some occasions by his partner. HR also attended some of the meetings.

99. None of the meeting notes state that the claimant had been allocated a permanent route after route rationalisation.

100. [Bundle 228] are notes of the meeting on 28 October 2021. This was conducted by Mr Bishop, and the claimant's representative, Mr Arridge, attended, as did the Claimant.

> The meeting was held to discuss options for getting Joshua back to work after a lengthy absence.
>
> Joshua did return for a time but due to changes with the routes, Joshua had to go absent again.
>
> Joshua used to complete what was known as a Tesco route. These routes had 5-6 calls with no picking.
>
> When Joshua returned the first time, these routes no longer existed,
>
> Joshua did try to complete a route In the area he used to do but the route changed so much it was causing Joshua too much stress.
>
> We discussed number of calls he felt comfortable completing and the areas he felt comfortable delivering in.
>
> It was decided to adjourn the meeting until we had a route available that was in line with Joshua's occupational health requirements.

101. Thus, no route numbers are mentioned in the document. Furthermore, memories appear to have faded already. The Claimant did route 752 on his return in July 2021, and route rationalisation was not implemented until late August/early September (rather than before the Claimant's July 2021 return). The reference to "did try to complete a route" is quite possibly a reference to the fact that, on the afternoon of 2 September 2021, Mr Shaw gave details of a route to the Claimant, but, on 3 September, he felt unable to attempt it. However, the document lacks sufficient clarity to be sure.

102. [Bundle 230] is the occupational health report dated 16 November 2021 which was produced after that meeting.

102.1 In the background section, it referred back to reasonable adjustments which had previously been agreed; these were similar to those which had been outlined in the June report. It referred to the claimant's having been given duties which restricted the amount of picking in hot and humid environments and also to the fact that the claimant had been given a "fixed route to eliminate change and the unknown".

102.2 This report stated that the claimant was medically fit to return to work if adjustments below could be implemented.

102.3 Six bullet points were included.

> • A stress risk assessment. This should be reviewed and monitored periodically. Regular welfare chats are also recommended to see how he is coping and if further support can be putin place.
>
> • A phased return to work.
>
> • Routes with fewer calls as he finds interacting with people he doesn't know very stressful.
>
> • Being restricted from picking goods In hot and humid conditions, as the hot and humid conditions cause him to feel he Is having a panic attack
>
> • Having a fixed route at work; this would provide him with routine and avoid change, which he finds very stressful. He feels very anxious in new situations,
>
> • His sleep is variable; some nights he does not sleep well. He may, therefore, benefit from a later start time, If you can accommodate this.

103. As the respondent accepts, while it commenced a stress risk assessment in July, it did not update it following the route rationalisation changes.

104. Subject to the phased return to work, and the flexible working request to reduce to 4 days out of 7, rather than 4 days out of 6, the claimant, was not suggesting that his daily hours needed to be reduced. Rather he wanted to do calls which had more time driving, and/or doing high-volume of stock at a particular delivery point, and thereby to reduce the number of calls per shift. This was because the Claimant found it stressful to deal with lots of different people and fewer calls reduced the need to interact with lots of different people.

105. One of the adjustments that had previously been agreed was that the claimant would not deliver to central London.

106. The claimant had not expressly stated any other specific geographical restrictions on the areas which he believed he was able to work, or not able to work. He had, however, specified that he needed the calls to be ones with which he was familiar. This was so that he knew, for example, where the delivery entrance was, who he

would meet there, and so on. As mentioned in the OH report, the adjustments previously implemented had been to avoid “the unknown”.

107. The respondent had interpreted the claimant's requirements as meaning that there was a geographical restriction on what routes they could potentially offer him. Following route rationalisation, and both before and after the start of the sickness absence which commenced in September 2021, the respondent had been considering routes which only had calls in similar geographical locations to those which the Claimant had previously delivered to, because they thought that allocating him routes which delivered to other areas would have been contrary to the Claimant's requirements and contrary to OH advice.

108. Following receipt of the November 2021 OH report, a wellbeing meeting took place via Teams on 8 December 2021 [Bundle 239]. In addition to those who attended on 28 October, there was Nancy Dean from HR.

108.1 The claimant said he agreed with the contents of the report.

108.2 It was agreed that Paul Daniels and would do a stress risk assessment.

108.3 It was agreed that there would be a phased return to work. The Claimant was asked what his requirements for that would be and he said that he had not thought about it.

108.4 The recommendation for a route with fewer calls was discussed. The Claimant stated:

> 752 last time was fine, there was loads of driving and about 8 calls

108.5 Mr Bishop replied:

> All routes have changed. That route no longer exists. The smallest route we have I think is between 12 and 15 calls. You had 115 last time, Monday the calls are the same, Tuesday they are different but in the same area. Most customers are served Monday, Wednesday and Friday. The reason for this is we don't have the drivers to cover the routes.
>
> All the routes have changed but they will be going to the same places but have different calls

108.6 In their oral evidence, neither Mr Shaw nor Mr Bishop were able to recall the number of the route which they had discussed with him (that, after route rationalisation, included calls from the former Routes 710, 711 and 752). It is possible that “115” is a reference to that, but the witness evidence did not expressly state that.

108.7 On the assumption that the route being discussed in the minutes is the same one they referred to in their evidence, the description of it in this meeting is not as detailed as that which we set out above, which was based on Mr Shaw's and Mr Bishop's oral evidence.

108.8 However, the claimant was asked if he had seen a copy of the route, and he said that he had. If it was the same one that he had driven with his partner on 3 September, he did not say so. In any event, he was asked what he thought of that route. He did not say that he had driven it with his partner and found it acceptable. He did not say that he had expected to be given it on 9 and 10 September 2021, but had not had it allocated. He did not answer the question at all; he neither said it was suitable nor that it was not suitable.

108.9 The Claimant's response to the question was to say that he had thought that his union representative was going to speak to Steve Gaish (Centre Distribution Planner). In context, given what the claimant had said immediately beforehand about how 752 had been acceptable to him, his response when asked about route 115 meant that the claimant did not believe that route 115 was suitable for him even if he was permanently allocated to that route. He was seeking something different to that.

108.10 As of the date of this meeting, the claimant was of the opinion that none of the suggested routes were suitable for him and that instead a route should be developed specifically for him.

109. On 25 January 2022 [Bundle 248], a meeting took place attended by the Claimant, Mr Arridge, Ms Huckett, Mr Shaw, and Ms Dean.

109.1 Mr Shaw stated he was willing to go through every route with the claimant and he was also willing to look at how the amount of picking for those routes could be reduced.

109.2 Mr Shaw repeated the information which had been given to the Claimant previously which was that, from the respondent's point of view, it was not possible to create a route based specifically for the claimant. Rather, head office fixed the routes, and there was limited flexibility to adjust them locally.

109.3 Mr Shaw asked the Claimant how many calls he could do. The Claimant replied that it would need be something like on Route 752, perhaps 7 to 10 per day, and perhaps big jobs which might require him to return to Enfield to reload the van during the shift.

109.4 Mr Shaw said that there were no routes that met all of the Claimant's requirements. In particular, while he might be able to find a route out of Enfield that had no more than 10 to 12 calls, it would not be in Dagenham. This was because he believed, based on previous discussions, and his interpretation of previous OH advice, that the Claimant could not go to unfamiliar locations, and he believed that meant that the Claimant was only willing to consider routes in which all the calls were around Dagenham.

109.5 He asked if the Claimant could possibly be flexible about location. The Claimant mentioned Basildon and Chelmsford. He said his priority was to have fewer different calls on the shift, and that extra driving meant fewer calls, and was willing to do extra driving.

109.6 He said he had asked about doing "run out" routes. Mr Shaw said the Respondent had not been willing to offer him that because it would have been contrary to Mr Shaw's perception of the OH advice; it would be new customers each time, and unpredictable from day to day. It could be to various new geographical locations.

109.7 Ms Huckett commented that the Claimant was willing to widen the range of geographical locations to which he would deliver. The Claimant confirmed that if the number of calls on a shift was reduced towards the number that he thought was feasible, then he would be willing to consider other areas.

109.8 Mr Shaw said that with (what he perceived to be) the new information that the Claimant was willing to deliver to a larger number of geographical locations than had previously been considered, it might be possible to find something. He adjourned the meeting briefly to attempt to speak to Steve Gaish. He could not get hold of him so, when the meeting resumed, he sought to recap that he would try to find a route with no more than 12 calls a day, which operated out of Enfield, with no restrictions on the geographical location (other than no calls in Central London).

109.9 During the recap, the Claimant and his union representative brought up that while the calls would be large ones (that is, the Claimant wanted to do as few calls as possible, which meant that each individual call would potentially be a large delivery) he preferred not to drive the larger of the two types of vehicle which the Secondary Drivers were potentially allocated. Alternatively, if it were to be the larger vehicle, it might have be only stores with dedicated delivery areas, rather than a need to park on the street.

109.10 Mr Shaw expressed frustration that every time some progress appeared to have been made, a different obstacle was raised. He sought to get the Claimant to clarify precisely what his requirements were for vehicle size and delivery type. His union representative encouraged him to answer and the locations, vehicle type and number of calls were discussed.

109.11 Mr Shaw commented, and we find this was accurate:

> Knowing this information has opened up a lot. By remaining in Dagenham and Romford it was limited.

110. Towards the end of the meeting, Ms Dean confirmed a stress risk assessment would be completed. Dates for return were discussed and it was noted that the Claimant's current fit note expired 2 February 2022. The Claimant suggested that he might be able to return 3 February 2022. Ms Dean said that if he was not, then the Respondent would need to look to commence the long-term absence procedure. The Claimant queried why that had not been done in the past; he said that he would look to escalate the matter if a suitable route was not found.

111. The claimant returned to work on 15 February 2022 and he had a return to work meeting with Mr Bishop that day. [Bundle 262].

111.1 Page one of the form recorded that there had been 103 days absence and that it had been certified.

111.2 The handwritten information noted the occupational health reports.

111.3 The top of the second page was about a 12 month attendance history and included preprinted information about whether the employee might have triggered the Attendance Management Procedure. It states:

> If the employee has triggered the Attendance Management Procedure, inform them that they have triggered the procedure and that they will be Invited to an Attendance Review Meeting, the purpose of which will be to review the employee's absences and their capability to attend work on a regular and consistent basis. Please refer to Knowledge Base for relevant guidance or templates.

111.4 Nothing is handwritten in that section and but we accept Mr Bishop's oral evidence that he did inform the claimant that he would be invited to an attendance review meeting, as per the preprinted information on that form.

112. [Bundle 264] records the "Reasonable Adjustments Meeting/Review" part of the meeting between the Claimant and Mr Bishop that day, 15 February.

112.1 The adjustments the Claimant suggested included less picking (no more than 2 stacks) and larger volume calls/ fewer calls. The Claimant suggested 6 to 10. He also wanted to see the risk assessment for the calls before he did them.

112.2 The document recorded that the requested adjustments were all agreed. It said there would be regular 1 to 1s with line manager. It said that the adjustments would be reviewed every 4 weeks during the phased return to work, and then annually thereafter.

112.3 The Claimant agreed the contents of the document and signed it.

113. The claimant returned to what was called route 193. This had not been previously identified because Mr Bishop and Mr Shaw had thought that the claimant was subject to some geographical restrictions, which would have meant such a route was not suitable for him. However, this route was satisfactory in terms of the amount of picking the amount of calls and so on.

114. It was a route which had been made available with input from Mr Shaw and Mr Norton. It was not "fixed" in the sense of being to the same locations, and in the same order, each time. (See, for example, [Bundle 278], being an email from Mr Norton identifying which 4 specific calls would make up Route 193 on a particular date.)

115. Mr Bishop sent frequent reminders to Mr Norton about the days that he wanted that route to run (that is, the dates on which the Claimant would be working as part of his phased return). Other Driver Operations Team Managers also made requests.

116. This route ceased to be made available after early April. On 4 April 2022, at 12:11, [Bundle 286], Mr Norton wrote to Mr Tasker and Mr Shaw stating:

> Spoke with Darren about this, he wants to look at a different approach, which I'm sure he'll pick up with you about.... Therefore we won't progress this request- we'll run the other 193 this week as per Wayne's request, but again, no more after that - any problems, please give me a buzz

117. The reference to "Darren" was to Darren Bond, Mr Tasker's line manager.

118. From that point onwards, the Driver Operations Team Managers no long contacted Mr Norton to ask him to make sure that Route 193 would be available on the days that the Claimant was to work.

119. Instead, Mr Bishop created run out routes for the claimant. The method which he used to create the routes was to look at which delivery locations the claimant was familiar with (that were allocated to one of the routes that was due to go out that day) and then take a selection of deliveries from those other routes to create a run out route specifically for the claimant. It was not the same route each day. That is the arrangement which continued throughout the time period which is relevant to this claim, in other words, up to 22 July 2022 when the amended Grounds of Complaint was sent to the Tribunal.

120. On 6 July 2022, Mr Bishop held a welfare meeting with the Claimant. The Claimant's union representative, Mr Arridge, attended. [Bundle 313 to 314]. In advance of that meeting, the Claimant had produced a list of some things that he wanted to discuss. [Bundle 315].

121. The Claimant's perception, as per that list, was that Bolton had "refused" to continue with the arrangement to make Route 193 available on the days that he worked. He noted that the arrangement was the one mentioned above, namely that Mr Bishop and the Driver Operations Team Managers were creating routes for him. (Though he suggested that sometimes the route created was not suitable if done by someone other than Mr Bishop.) As part of an argument for why there should be no OH referral, the Claimant stated in his list of items to be discussed:

> 3. As my manager can you see any point In me having another Occupational health assessment when what you have In place [at the moment] is working and keeping me in work.

122. In the meeting, Mr Bishop did not dispute the Claimant's comment that head office had "refused" to continue with the arrangement to make Route 193 available on the days that he worked. He stated that he had sought to create suitable routes and let the Claimant know about them the previous day. He said that the only other team managers who would allocate routes to the Claimant were doing the same. He accepted that it was sometimes impossible to inform the Claimant the previous day about which specific calls would be on the run out route, but the managers were making sure that it was only calls with which the Claimant was familiar. We accept that Mr Bishop's account in the meeting was accurate, and described the arrangement that had actually been in place since early April 2022.

123. In relation to the Claimant's point 3, as cited above, Mr Bishop replied:

> If you're happy with how It is going, then no, unless another issue arises

124. By saying this, he was acknowledging that the Claimant was content with the current arrangement (and the Claimant's potential willingness to do run out routes had been flagged up to Mr Shaw in the January 2022 meeting) and agreeing with the Claimant that no new OH referral appeared to be necessary in those circumstances.

125. Following the claimant's February 2022 return to work, the claimant sent the email at [Bundle 266.] It was sent on 21 February 2022 to Sarah Nash in human resources. It referred to the claimant's five months absence and the fact that his pay had been reduced during that period as he was deemed to be on sickness absence. He sought three months back pay. The respondent accepts this email was a protected act.

126. On 8 March 2022, Ms Nash of HR replied [Bundle 269]. She refused the request for three months back pay and set out her reasons.

127. Following this, on 21 March 2022, the claimant sent the email at [Bundle 274]. This was a formal grievance and respondent accepts that this was also a protected act. It was a reply to Ms Nash's email and it disagreed with some of the things she had stated on 8 March.

127.1 Amongst other things, the claimant disputed that the reason he did not return to work promptly after the December meeting was that it had been his insistence that a meeting with Steve Gaish take place first.

127.2 In response to her comment that he had said, in the January meeting, that his need for reasonable adjustments had changed (and had not done so at earlier meetings), the Claimant commented:

> In the meeting on the 25th you state I informed Gareth and Nancy that my requirements had changed. Yet again this is incorrect. I informed them that I understand what I needed was hard for them to do so I would go against the occupational health report in regards to the areas I can cover on the basis that the call level was not too high. This would allow me more time and allow the company to put me in to a bigger area which is out of my comfort zone but a big compromise on my part.

128. In other words, the Claimant did not deny that he gave new information to Mr Shaw on 25 January. He did not claim that Mr Shaw should have already been aware that he was willing and able to do calls in geographical areas that were different to those in which he had previously done routes. He did not claim that Mr Shaw should have realised that the existing OH advice allowed the Respondent to allocate routes to the Claimant in areas that were new to him.

129. [Bundle 616] are the attendance review meeting notes. These cover two meetings the first of which was on Thursday, 24 March, and the second was 30 March.

129.1 Driver Operations Team Manager, Don Marrese conducted both meetings. The claimant's union representative, Derek Arridge, was in attendance as well as the Claimant.

129.2 The Claimant signed the notes of both meetings. On 24 March, the notes record a discussion that the reason there had been a delay between the Claimant's return to work on 15 February and the date of the meeting was a combination of the fact that the Claimant was not scheduled to attend work every day, because of his phased return, and the fact that there had been a Covid absence.

129.3 Neither the claimant nor his union representative disputed that this was true. There was no suggestion, at the time, that this meeting should not have taken place. There was no suggestion that holding this meeting represented a change from anything the claimant was told on 15 February.

130. Mr Marrese has not been a witness at this hearing and therefore we have no direct evidence from him about whether he was aware of either the first email to Ms Nash (on 21 February) or the formal grievance (on 21 March).

130.1 We have not been persuaded, on the balance of probabilities that he did know about either of them.

130.2 He was not directly involved in either email as a recipient, or as a decision maker. There is no evidence that he was asked to comment as a witness to the substance of the grievance. The claimant has not suggested that either he or his union representative made Mr Marrese aware of the emails to Ms Nash, or provided any evidence that anyone else made Mr Marrese aware.

130.3 We accept Mr Marrese was not told about those emails, or the Claimant's request for back pay, by anyone who gave witness evidence for the respondent during this hearing.

131. At the 24 March 2022 meeting, it was recorded, amongst other things, that "appropriate adjustments have now been made which will allow [the Claimant] to maintain a regular attendance level". Our finding is that Mr Marrese wrote this to record what the Claimant had said in the meeting, and the Claimant signed the notes, thereby showing he agreed with that comment.

132. The meeting was adjourned to 30 March 2022. The notes show that the Claimant drew the Attendance Management Policy ("AMP") [Bundle 147] to Mr Marrese's attention, and, in particular, section 2.3:

> 2.3 Consideration will be given to whether poor attendance may bo related to a disability. A medical condition will amount Io a disability If It satisfies the test set out on the Equality Act 2010. This requires that an Individual has a mental or physical impairment which has a substantial and long term adverse effect on their ability to carry out normal day to day activities. Under such circumstances the Company may consider whether there are any reasonable adjustments that could be made to an employee's working arrangements or the requirements of a job that will provide support at work and/or assist a return to work. The Company may also consider

> making adjustments to this procedure In appropriate cases. If an employee considers that they are affected by a disability or any medical condition which affects (heir ability to undertake their role they should speak to their line manager In the first instance.

133. Mr Marrese made the decision which is recorded in the letter dated 30 March 2022 [Bundle 283] as well as in the meeting notes. The letter referred to the claimant's absence from September 2021 to February 2022 which was a total of 104 days. The letter asserted that Mr Marrese he had given the matter careful consideration and that his decision was in accordance with AMP. His decision was:

> Following careful consideration, in line with the company Attendance Management Policy, I have decided to place you on Stage 1 of the Attendance Management Procedure. This means that your attendance at work will be monitored starting from 15th February 2022 (the date when you returned from your last absence).
>
> A review will take place In three months to check progress and then a further review will happen every three months to the end of the 6-month review period. If at any time there has not been a significant and sustained Improvement In your attendance, you may be moved to the next stage In the Attendance Management Procedure.

134. Notably, the letter included the last sentence just cited, which described the possibility of moving to the "next stage" in AMP. The stages appear in the bundle starting at [Bundle 151].

134.1 Stage 1: A review period that, after 6 months, might result in the employee's attendance being confirmed as satisfactory. Alternatively, the review period might be extended to 9 months, or else the employee might be moved to stage 2.

134.2 Stage 2: A 9 month period with reviews at 3, 6, 9 months. One possible outcome is to move to Stage 3.

134.3 Stage 3: A 12 month review period with one possible outcome being to move to Stage 4, at which point dismissal would be considered.

135. The letter confirmed that, as stated in AMP, the Claimant had the right to appeal. The claimant appealed the following day [Bundle 285].

136. The Claimant and Mr Shaw had a discussion on Monday 11 April 2022. This resulted in the email and attachment [Bundle 289]. The Claimant was invited to an appeal meeting on Wednesday 20 April 2022, and it went ahead on that day. The notes are [Bundle 287]. The Claimant was accompanied by his union representative, Kevin Chamberlain. The assertions made on behalf of the Claimant were (i) that he required adjustments and (ii) the Respondent had agreed to implement adjustments during the return period in July/August 2021 and (iii) these adjustments had been "taken away". Although specific date were not stated, each of the Claimant and Mr Shaw gave their perspective of what had happened on 3 September 2021 and thereabouts, and about the implementation of "route rationalisation". The meeting did not discuss the Claimant's return from 15 February 2022 onwards; it was focused on the Claimant's argument that the Stage 1 warning was inappropriate.

137. Around 1 July 2022, Mr Shaw informed the Claimant that the appeal had been upheld. We accept that [Bundle 310], which is dated 1 July 2022 is Mr Shaw's genuine outcome letter and was actually written around 1 July 2022 (the date which it bears). Due to an error on Mr Shaw's part, the letter was not actually received by the Claimant until 19 September. [Bundle 369]. The delay in receiving the written confirmation caused concern to the Claimant, as noted in paragraph 79 of his statement:

> When I received the outcome of the appeal, I was told that I would be removed from the stage 1. Although it is dated 1 July 2022 (page 310) I only received the letter on 19 September 2022 (page 369). Until it was confirmed in writing, as far as I was concerned the waring had not come off my file.

138. The person appointed to deal with the Claimant's 21 March 2022 grievance was Adrian Armstrong, a warehouse manager. In due course, a grievance meeting took place on 12 April 2022. [Bundle 291]

138.1 When the meeting started, Mr Armstrong made clear that he had not looked at occupational health reports and asked for details of what they said.

138.2 Both Mr Armstong's HR adviser, and the claimant's union representative (Mr Arridge), suggested that Mr Armstong would need to read them and do so outside of the meeting.

139. [Bundle 300] is Mr Armstrong's invitation (dated 11 May) to an a resumed grievance meeting on 27 May. In due course, that was rearranged for 6 June at the claimant's request. The meeting notes are [Bundle 305].

139.1 At the outset of the meeting Mr Armstrong said that following his investigations and having read the OH reports, as a gesture of goodwill, the Respondent would repay the claimant's lost wages for the period of his absence as requested in the grievance.

139.2 Mr Armstrong did not accept or acknowledge that the respondent was at fault. His decision was that maintaining fixed routes for the claimant would not have been possible. He suggested that the next step would be to refer the claimant back to occupational health to review capability.

139.3 Upon the claimant's request for clarification, Mr Armstrong said that the occupational health report would tell the respondent what the claimant was able to do.

139.4 As the discussion continued that the claimant and his representative suggested that there was no need for occupational health report, because it would be the same as the advice previously given.

139.5 Mr Armstrong commented that the Claimant was doing runouts (in other words, the arrangement in place since early April 2022) and expressed the opinion that OH advice was required to confirm that was suitable.

140. We are satisfied that Mr Armstrong was aware of both the 21 February 2022 email to Ms Nash and the later formal grievance (sent to Ms Nash on 21 March). He was making a decision in relation to the formal grievance and must have been aware of Ms Nash's decision to say “no” to the informal request for pay to be awarded for (part of) the absence period from September 2021 to February 2022.

141. The outcome letter [Bundle 308] dated 7 June 2022, and sent to the Claimant on 9 June 2022 matched what the Claimant was told in the meeting of 6 June.

142. The claimant also went to stages two and three in the grievance procedure and the outcomes of those specific stages are not relevant to the matters that we have to decide.

143. In relation to the recommendation made by Mr Armstrong for an occupational health referral, the Claimant’s line manager, Mr Bishop confirmed to the claimant in July that he was satisfied by the claimant’s and his union representative's comments that such a referral was not needed. In July 2022, it was agreed and confirmed that no further occupational health report to address whether the claimant was disadvantaged by the runouts arrangements was required.

The Law

Burden of Proof for the Equality Act complaints

144. The burden of proof provisions are codified in s.136 EQA and s.136 is applicable to all of the contraventions of the Equality Act which are alleged in these proceedings.

> **136 Burden of proof**
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

145. It is a two stage approach.

145.1 At the first stage, the Tribunal considers whether the Tribunal has found facts - having assessed the totality of the evidence presented by either side and drawn any appropriate factual inferences from that evidence - from which the Tribunal could potentially conclude - in the absence of an adequate explanation - that a contravention has occurred.

145.2 At this first stage it is not sufficient for the claimant to simply prove that the alleged treatment did occur. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention of the act. The Tribunal can and should look at all the relevant facts and circumstances when considering this part of the burden of proof test.

146. If the claimant succeeds at the first stage then that means the burden of proof is shifted to the respondent and the claim is to be upheld unless the respondent proves the contravention did not occur.

147. In Efobi v Royal Mail Neutral citation: [2021] UKSC 33, the Supreme Court made clear that the changes to the wording of the burden of proof provision in EQA compared to the wording in earlier legislation do not represent a change in the law. Thus when assessing the evidence in a case and considering the burden of proof provisions, the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong Neutral citation: [2005] EWCA Civ 142 and Madarassy v Nomura International Neutral citation: [2007] EWCA Civ 33.

148. The burden of proof does not shift simply because, for example, the claimant proves that they have a disability and/or that there was unwanted conduct and/or that they did a protected act and/or that there was difference in treatment between her and somebody who did not have the disability. Those things only indicate the possibility of discrimination or victimisation or harassment. They are not sufficient in themselves to shift the burden of proof, something more is needed.

149. It does not necessarily have to be a great deal more and it could in an appropriate case be a non-response from a respondent or an evasive or untruthful answer from an important witness.

150. In terms of assessing the burden of proof provisions as per Essex County Council v Jarrett [2015] UKEAT 0045/15/0411, where there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof is shifted in relation to each one. That does not mean that we must ignore the rest of the evidence when considering one particular allegation. It just means that we assess separately, for each allegation, whether the burden of proof shifts or not, taking into account all of the facts which we have found.

Time Limits

151. In the Equality Act 2010 ("EQA"), time limits are covered in s.123, which states (in part):

> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

152. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act was committed.

153. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. That does not meant that the lack of a good reason for presenting the claim in time is fatal. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

154. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike, say, the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it is wrong to interpret it as if it contains such a list. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion.

155. The factors that may helpfully be considered include, but are not limited to:
    155.1 the length of, and the reasons for, the delay on the part of the claimant;
    155.2 the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;
    155.3 the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

Indirect discrimination

156. Section 19 EQA states, in part:

> **19 Indirect discrimination**
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

157. Disability is one of the protected characteristics listed in section 19(3).

158. The phrase "provision, criterion or practice" is commonly abbreviated to "PCP". It is not separately defined in the Equality Act 2010. Tribunals must interpret it in accordance with guidance in the EHRC Code and in appellate court decisions.

159. The PCP does not have to be a complete barrier preventing the claimant from performing their job for section 19 to be triggered. Furthermore, a PCP might be "applied" even if the employee is not necessarily disciplined or dismissed if they fail to meet the requirement. In Carreras v United First Partners Research, the EAT concluded that an expectation or assumption that an employee would work late into the evening could constitute a PCP, even if the employee was not "forced" to do so.

160. There are two aspects to the "particular disadvantage" limb of the test for indirect discrimination.

160.1 that the PCP puts (or would put) persons who share the claimant's protected characteristic at a particular disadvantage when compared with persons who do not share it. This is sometimes referred to as "group disadvantage".

160.2 that the claimant must personally be placed at that disadvantage.

161. The word "disadvantage" is not specifically defined in the Equality Act 2010. The Code of Practice suggests that disadvantage can include denial of an opportunity or choice, deterrence, rejection or exclusion. A person might be able to show a particular disadvantage even if they have complied with the PCP in order, for example, to avoid losing their job. It is sufficient that the PCP caused the claimant "great difficulty" in meeting their obligations.

162. If the PCP is shown to exist and to place persons with the relevant protected characteristic, and the claimant, at a particular disadvantage, the burden of proof switches to the respondent to show that the PCP is nevertheless a proportionate means of achieving a legitimate aim.

163. The "legitimate aim" of the PCP should not be discriminatory in itself, and must represent a real, objective consideration. The health, welfare and safety of individuals may qualify as legitimate aims provided that risks are clearly specified and supported by evidence.

164. Reasonable business needs and economic efficiency may be legitimate aims. However, a discriminatory rule or practice will not necessarily be justified simply by showing that the less discriminatory alternatives cost more.

165. Once a legitimate aim has been established, the tribunal must consider whether the discriminatory PCP is a proportionate means of achieving that aim.

166. Tribunals considering whether a PCP is a proportionate means of achieving a legitimate aim must undertake a comparison of the impact of the PCP on the affected group as against the importance of the aim to the employer.

167. The tribunal must consider whether there are less discriminatory alternative means of achieving the aim relied upon. However, the existence of a possible alternative non-discriminatory means of achieving the aim of a measure or policy does not, in itself, make it impossible for the respondent to succeed in justifying a discriminatory PCP. The existence of an alternative is only one factor to be taken into account when assessing proportionality.

168. The tribunal must make an objective determination and not (for example) apply a range of reasonable employers test.

169. The defence to a section 19 claim can, in principle, rely on a legitimate aim which was not in fact the reason for imposing the PCP at the relevant time.

Victimisation

170. Victimisation definition is in s.27 EQA.

> **27 Victimisation**
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.
>
> (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

171. There is an infringement if a claimant is subjected to a detriment and the claimant was subjected to that detriment because of a protected act.

172. The alleged victimiser's improper motivation could be conscious or it could be unconscious.

173. A person is subjected to a detriment if they are placed at a disadvantage. There is no need for the claimant to prove that their treatment was less favourable than a comparator's treatment.

174. For the Claimant to succeed in a claim of victimisation, we must be satisfied (having taken into account the burden of proof provisions) that the claimant was subjected to the detriment because they did a protected act or because the employer believed that they had done or might do a protected act.

175. Where there is a detriment and a protected act, then those two things alone are not sufficient for the claimant to succeed. The Tribunal has to consider the reason for the treatment and decide what consciously or otherwise motivated the respondent. That requires identification of which decision makers made the relevant decisions as well as consideration of their mental processes.

176. The claimant does not have to demonstrate that the protected act was the only reason for the detriment. Furthermore, if the employer has more than one reason for subjecting the Claimant to the detriment, then the claimant does not have to establish that the protected act was the principal reason. A victimisation complaint can succeed provided the protected act has a significant influence on the decision making. An influence can be significant even if it was not of huge importance to the decision maker. A significant influence is one which is more than trivial.

177. A victimisation complaint might fail where the reason for the detriment was not a protected act itself but something else which (while being in some way connected to the protected act) could properly be treated as separate. See Martin v Devonshires Solicitors [2010] UKEAT 0086/10.

178. S.136 applies and so the initial burden is on the claimant to demonstrate that there are facts from which the Tribunal might conclude that the detriment was because of the protected act.

Discrimination arising from disability

179. Discrimination arising from disability is defined in s.15 of the Act.

> **15 Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if—
>
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

180. The elements that must be made out in order for the claimant to succeed are that: there must be unfavourable treatment; there must be something that arises in consequence of the claimant's disability; the unfavourable treatment must be because of, in other words caused by, the something that arises in consequence of the disability. Furthermore, the alleged discriminator must also be unable to show either that the unfavourable treatment was a proportionate means of

achieving a legitimate aim or, alternatively, that it did not know and could not reasonably have been expected to know that the claimant had the disability.

181. The word ”unfavourably” in s.15 is not separately defined in the legislation but should be interpreted consistently with case law and the EHRC Code of Practice. Dismissal, for example, can amount to unfavourable treatment but so can treatment which is much less disadvantageous to an employee than dismissal.

182. When considering what the respondent knew or could have reasonably been expected to know, the relevant time is the time at which the alleged unfavourable treatment occurred.

183. The complaint will not succeed if the respondent is able to show that the unfavourable treatment was a proportionate means of achieving a legitimate aim. The aim relied upon should be legal, should not be discriminatory in itself, and must represent a real objective consideration. Business needs and economic efficiency may be legitimate aims, but simply demonstrating that one course of action was less costly than another is not likely to be sufficient.

184. In relation to proportionality, the respondent is not obliged to go as far as proving that the discriminatory course of action was the only possible way of achieving the legitimate aim. However, if there are less discriminatory measures which could have been taken to achieve the same objective then that might imply that the treatment was not proportionate.

185. It is necessary for there to be a balancing exercise which takes into account the importance of the respondent achieving its legitimate aim in comparison weighed against to the discriminatory effect of the treatment. Regardless of whether the respondent carried out that balancing exercise at the time (and it is not necessary for the Respondent to prove that it did), the tribunal carries out its own balancing exercise - based on the evidence presented at the hearing – in order to decide if the section 15(1)(b) defence succeeds.

186. If a respondent has failed to make reasonable adjustments which could have prevented or minimised the unfavourable treatment, then it is going to be very difficult for the respondent to show that the treatment was a proportionate means of achieving a legitimate aim.

187. Section136 EQA applies to alleged contraventions of section 15 EQA.

<u>Failure to make reasonable adjustments,</u>

188. Section.20 defines the duty. S.21 and schedule 8 also apply.

> **20 Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

(6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.

(7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.

(11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Schedule 8, Part 3, paragraph 20: Lack of knowledge of disability, etc.

(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know—

(b) in any case referred to in Part 2 of this Schedule, that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.

189. The expression “provision, criterion or practice” [usually shortened to “PCP”] is not expressly defined in the legislation. We have regard to the guidance given by EHRC to the effect that the expression should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, criteria, conditions, pre-requisites, qualifications or provisions.

190. The claimant must clearly identify the alleged PCPs to which the adjustments should have been made. The tribunal must only consider those PCPs as identified. See Secretary of State for Justice v Prospere [2015] UKEAT 0412/14/3004.

191. When considering whether there has been a breach of s.21 we must precisely identify the nature and extent of each disadvantage to which the claimant was allegedly subjected. Furthermore, we must consider whether there is a substantial

disadvantage when the relevant alleged PCP is applied to the claimant in comparison to when the same PCP is applied to persons who are not disabled.

192. The claimant has the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred that the duty may have been breached. If they show that prima facie case, then we need to identify the step or steps (if any) which the respondent could have taken to prevent the claimant suffering the disadvantage in question, or to reduce that disadvantage. If there appear to be such steps, then the burden is on the respondent to show that the disadvantage could not have been eliminated or reduced by such potential adjustments or, alternatively, that the adjustment was not a reasonable one for it to have had to make.

Analysis and Conclusions

193. We deal first with the reasonable adjustments claim in relation to the claimant's return to work in February 2022.

194. The implication in paragraphs 8 of the list of issues is that there is a dividing line around 11 February 2022. Paragraph 9 refers to periods later than 21 March. The implication is that the claimant was not suggesting there was a failure to make reasonable adjustments in the period from around 12 February to around 21 March 2022.

195. In fact, as per our findings of fact, the claimant returned to work on 15 February 2022. There had been discussions in the period running up to 15 February, and there was a return to work interview and a reasonable adjustment review on the day of his return.

196. Paragraph 4 of the list of issues, is: “Does the Respondent’s route rationalisation of a seven-day delivery schedule with different routes everyday amount to a PCP?” Paragraph 5 is about disadvantage and 6 is about knowledge.

196.1 The “route rationalisation” programme is described in the findings of fact. Our assessment is that it commenced around the very end of August 2021 or the very beginning of September 2021.

196.2 It had not ceased by the time the Claimant returned to work in February 2022. It continued to operate at all times relevant to this dispute.

196.3 Route rationalisation affected all the secondary drivers at Enfield.

196.4 Route rationalisation was a “provision, criterion or practice” (“PCP”) within the meaning of that phrase in section 20(3) EQA.

196.5 Route rationalisation did place the claimant at a substantial disadvantage when compared to those who were not disabled. Features of the Claimant’s

disability included the need for predictability and the need to do the same routes each day, and make the same calls (so dealing with people he knew) each day. Route rationalisation meant, amongst other things, no driver was able to do the same route regardless of which of the seven days (Sunday to Saturday) they happened to be on shift. Enfield no longer operated any route such that all the calls were the same each day, and in the same sequence each time. The claimant was disadvantaged by the new PCP which came in a few weeks after his phased return (from 22 July 2021) had commenced.

196.6 The Respondent was aware of the disadvantage. At the latest, it was aware from the date of the 3 September 2021 texts and conversations between the Claimant and Mr Shaw.

197. In the period following his February 2022 return to work, as per the findings of fact, at first the attempts to make adjustments were that Mr Bishop (and the other Driver Operations Team Managers) liaised with Mr Norton at head office to let him know which dates he needed to make sure that route 193 was running. (That is, the dates on which the Claimant was going to be on shift, as part of his phased return to work.) As mentioned in the findings of fact, the route was not exactly the same each time. Rather it was based on Mr Norton's assessment of which particular calls from other routes were best suited to being hived off for the Claimant on a particular day.

198. There was a cut-off point in early April 2022. In the period from 15 February until shortly after 4 April 2022, Mr Bishop was attempting to get central planning to make sure that route 193 was on the roster every time the claimant was at work, but, as the words of, and tone of, the emails makes clear, it was not always done, and this caused some friction between Mr Bishop and Mr Norton.

199. We accept the respondent's evidence that the reason it was not always possible to put that route on was that there was no guarantee that enough customers on that route would require a large delivery on the days that the claimant was working so as to enable head office to compile a suitable route.

200. A different arrangement was made from April onwards. This was that the local managers were able to use their discretion to create routes specifically for the claimant. As mentioned in the findings of fact, these so-called "run outs" were not the same routes every day, but the managers took account of which customers required large deliveries on a particular day and, from that, formed a route consisting only of calls that the claimant was familiar with. So the sequence was unfamiliar, and not always notified to the Claimant earlier than the start of the shift, but the actual sites that he was going to were sites that he knew.

201. The created routes (both in the period before and after April 2022) met the requirements of (i) not having many calls per shift and (ii) little picking for the Claimant to do (because Team Managers arranged for assistance to be provided).

202. A requirement to do calls to locations, and to deal with people, with whom the Claimant was unfamiliar would have placed the Claimant at a disadvantage (in comparison with persons who are not disabled). However, from 15 February 2022, the Respondent made an adjustment to "route rationalisation" to avoid that disadvantage.

203. Similarly, the requirement for drivers to do "picking" placed the Claimant at a disadvantage. However, the Respondent had taken steps to reduce that disadvantage. These steps were in place for the July to September 2021 return to work, and remained in place following the February 2022 return to work.

204. We have not seen any specific risk assessment done for the February 2022 arrangements (or, to the extent that they were different, the arrangements implemented from early April onwards). It is true, however, that once Mr Armstrong suggested (in June 2022) that further occupational health advice might be needed, the claimant was adamant that that was not the case. The Claimant and Mr Armstrong discussed the runout arrangements (and they were discussed again between the claimant and Mr Bishop on 6 July). The Respondent had no reason to believe that the absence of a new specific risk assessment was placing the Claimant at a disadvantage, and our decision is that it was not.

205. As we have already made clear, because of route rationalisation, on the Claimant's February 2022 return, the claimant did not have a fixed route every day, and this placed him at a substantial disadvantage because of his disability.

206. However, our decision is that providing the claimant with a fixed route every day was not a step which it was reasonable for the respondent to have to take. It was not practicable for the respondent to take that step for the reasons set out in the findings of fact: the arrangements prior to route rationalisation were not delivering an acceptable service to customers, and this was a threat to the business; creating a new model to minimise cancelled deliveries, while having few drivers available, required the Respondent to do away with the old model of offering to deliver to every customer on each of the seven days in a week; the replacement scheme meant different customers were receiving deliveries on different days; maximising efficiency required there to be over 300 possible routes (rather than fewer than 60); run out routes (because particular customers had placed large orders, and so the vehicle scheduled to do that call would have been overloaded) were still needed, but it was not possible to know (much) in advance which routes would be affected, or which calls to remove from the affected routes to create a run out route on a particular day.

207. It was feasible for the Respondent to give the Claimant shifts which required fewer calls (and that was done) and feasible for it to reduce the amount of picking which the Claimant had to do (and that was also done), and feasible to take account of which areas the Claimant could deliver to (and that was done).

208. Our overall conclusion, then, in relation to paragraph 7 of the list of issues, is that there was no failure to make reasonable adjustments for the period from 15 February 2022 onwards, because there were no further steps that it was reasonable for the Respondent to have to take to (attempt to) reduce the disadvantage further.

209. For paragraph 8 the list of issues, as we have said,

    a) There does not appear to be a recoded risk assessment for any of the period from the Claimant's return. However, contrary to the allegation, it is not an adjustment that was in place and then removed. In any event, it does not represent a failure to make reasonable adjustments in any part of the period from 15 February onwards (before or after 21 March).

    b) He did have routes with fewer calls. It would not have been a reasonable step for the Respondent to have had to give him fewer still. The routes which were created as run out routes comprised large calls on routes that would otherwise have been overloaded. The aggregate size of these on a given day was dependent on what customers had ordered that day. Some days, there would be more calls on the run out route than others if the individual orders were not so large that only very few calls filled up the vehicle. However, the Claimant was being provided with fewer calls than if this adjustment had not been made. We do not agree that the adjustment for fewer calls was "taken away".

    c) The assistance with picking was provided both before and after 21 March 2022.

    d) He did not have a fixed route, as we have discussed. The arrangement for Jim Norton to set up a route did not provide an identical route each day, and nor did the arrangement for the local managers to allocate a run out route to the Claimant. In July 2022, the Claimant confirmed that the arrangement of his being allocated run out routes was working well (albeit his first preference was for a fixed route) in principle, while commenting that, in his opinion, sometimes the route on a particular day did not meet all of his requirements. We accept that some days were "worse" from the Claimant's point of view than others; for example, some days had more calls than others. However, it would not have been reasonable for the Respondent to have had to take further steps to (for example) reduce the calls further, either before or after 21 March 2022.

210. We turn now to the earlier period, that is prior to 15 February 2022.

211. The claimant returned to work in July 2021 and had route 752 available to him initially during his phased return to work.

212. Once route rationalisation came in, Route 752 was scrapped. The claimant's text messages of 26 August show he was aware that route 752 had disappeared, potentially forever.

213. Neither the grounds of resistance nor the written witness statements make any suggestion that the claimant was guaranteed a particular route to replace 752. On the contrary, they state that he was not.

213.1 Those documents do not say that he was offered a route of the type described to us in evidence by Mr Shaw and Mr Bishop, namely a route which was not the same every day, but was the same for each of Monday, Wednesday, Friday and then was also the same for Tuesday, Thursday, Saturday.

213.2 As mentioned in the findings of fact, each of Mr Shaw and Mr Bishop recall (and we accept that their recollections are truthful and accurate) that there was some discussion with the Claimant about that type of route potentially being available, and its being one which incorporated the patch formerly covered by Route 752.

213.3 However, neither Mr Shaw nor Mr Bishop were able to provide precise details (the route number, for example) of either the route, or of what the Claimant said about it, or of whether a firm offer was made to the Claimant that he could do this route all the time.

213.4 There has also been no specific evidence from the Claimant about whether he believed that the Respondent was telling him that he could have the route if he wanted it and, if so, whether it would have been acceptable to him and, if not, why not.

213.5 On the assumption that the route which Mr Shaw and Mr Bishop recall discussing with the Claimant is the same route which the Claimant drove with his partner on 3 September 2021, then, according to the contemporaneous documents in the bundle, the Claimant's objections in September seemed to be less about whether he could do that route, and more about the fact that he was not put on it on 9 or 10 September.

213.6 However, on the assumption that this is the same route (Route 115) which Mr Bishop asked the Claimant about on 8 December 2021, at that time, the Claimant did not state that he thought the route was suitable and nor did he complain that he should have been on it from September 2021 onwards. He did not assert that if he had been allocated that route every day then he would not have been required to start a sickness absence. He did not say that if he was allocated that route every day at that point, then he would be able to start a phased return. Instead, he implied the route was not suitable. His return in February 2022 was not to that route.

214. For reasons similar to what we have already said in relation to the period 15 February onwards, our decision is that an adjustment to route rationalisation to guarantee to the claimant that he would do the same deliveries regardless of which one of the seven days of the week he worked was not a step which it would have

been reasonable for the respondent to have had to take in the period early September 2021 to around 14 February 2022.

215. We are satisfied that the Respondent remained willing to make sure that the Claimant had assistance with picking. We are satisfied that there was no failure to make reasonable adjustments in relation to picking in the period July 2021 to 14 February 2022 (just like there was no such failure after that date).

216. We are satisfied that, in principle, once route rationalisation was implemented, Mr Shaw and Mr Bishop were willing to allocate a route to the Claimant which had few calls. At the time (and until 25 January 2022), they believed that the Claimant would only be able to do routes which were around the same geographical area that he had previously delivered to. There were no routes in that location with very few calls, and it would not have been practicable to create a run out route for the Claimant (every day) in just that area.

217. The lack of fixed routes did place the Claimant at a disadvantage and the burden of proof does shift to the respondent. However, as mentioned, we are satisfied by the evidence that the Respondent was not able to offer a fixed route to the Claimant that was exactly the same every day. That is true of the period August/September 2021 onwards, as it is of the period 15 February 2022 onwards. (And the Claimant did have a fixed route from 22 July 2021 until the end of August 2021).

218. For the avoidance of doubt, had the Respondent actually ensured that, every day, from September 2021, the Claimant was allocated to the route mentioned in Mr Shaw's and Mr Bishop's oral evidence, it does not necessarily follow that the outcome would have been something other than the Claimant commencing sick leave in September 2021. It is impossible to assess the likely outcome. The route might have met some of the Claimant's requirements (such as giving him predictability about which route he would be doing on a given day, and ensuring that he was doing calls to places/people with which he was familiar). However, the number of calls was higher than he thought desirable. In the January meeting, the Claimant seemed to prioritise having fewer calls per shift over some of the other requirements; thus, the route was not necessarily one which would reduce the disadvantage of route rationalisation. However, the Respondent has not proven that it would not have done so, and not proven that it could not have made arrangements such that the Claimant drove it every time he was on duty.

219. We are satisfied that, prior to the 25 January 2022 meeting, it would not have been a reasonable step for the Respondent to take the step which it did actually take fairly promptly afterwards. The step it took after 25 January and before 15 February was to look at a wider geographical area to find calls which could potentially make up a route which the Claimant could do: that is a route which met the Claimant's requirements of not too many calls (meaning bigger deliveries per call), and not too much picking. Prior to 25 January, the Respondent's understanding was that the Claimant's requirements included that the search had

to be limited to areas where the Claimant had previously made deliveries. At the time, the Claimant did not argue that the Respondent ought to have previously been aware that he could deliver to new and different areas; at the time, he made clear that he was supplying new information.

220. There is a gap in the evidence about whether the Respondent could have offered the Claimant a route which was not the same every day, but which was, as described above, a route which, Monday to Saturday, was one of two possible sets of calls (in the same sequence).

220.1 We accept that each of Mr Shaw and Mr Bishop thought at one point (and we infer around 3 September 2021) that it might be possible to give the Claimant the new route mentioned above. However, the gap in the evidence is that neither recalls exactly what (if anything) changed. In particular, did one of them decide not to offer the Claimant the route (and, after that, the Claimant's sickness absence commenced)? Or did the Claimant's sickness absence commence despite this possible route being "on the table" for him.

220.2 Similarly, the evidence potentially shows (though there is a lack of clarity and specificity) that the route Mr Shaw had in mind, and had described to the Claimant around 3 September, was not allocated to the Claimant on 9 or 10 September. However, it is unclear as to whether Mr Bishop or Mr Shaw would have ensured that would be done provided the Claimant confirmed that that was what he wanted.

221. Based on the evidence presented, we would have been unlikely to have been persuaded that, as a matter of fact, the Claimant was made a firm and unequivocal promise that he could have the route which Mr Shaw and Mr Bishop described in their oral evidence. The evidence does not establish one way or the other whether the Claimant's sickness absence would have commenced if he had been offered that route on a permanent basis (and, in particular, there is no evidence about what the arrangements would have been had the Claimant been required to work Sundays).

222. The evidence does not show that the Claimant proactively sought that particular route as an adjustment. There is no onus on a worker to have to identify the specific adjustments that the Respondent is obliged to implement. However, for time limit purposes, it is significant that the Claimant did not demand that route, even when he was specifically asked about it in December 2021, and he was not put on it in February 2022.

223. For the period from September 2021 to February 2022, the evidence presented is not necessarily sufficient for Respondent to discharge the burden of showing that there were no steps that it was reasonable for it to have to take to reduce the disadvantages caused to the Claimant by route rationalisation.

223.1 Given the way that the new route, and it availability, was described to us, then the Respondent has neither shown that it would not have been reasonable to have had to offer that route to the Claimant, nor that it did offer it.

223.2 Offering the route to the Claimant would not have met all of the Claimant's requirements as per his OH reports. Notably, it would not have been the same each day.

223.3 Offering the Claimant that route each of Monday to Saturday, would still have left a further issue to be solved for Sundays. Although, the Respondent has not proved that there could not have been a reasonable adjustment to solve that (for example, not requiring the Claimant to work Sundays).

224. The Respondent did, however, make clear to the Claimant that route rationalisation was here to stay, and he would not be offered any fixed route that was the same each day. At the very latest, this was made clear to him at the 8 December 2021 meeting when the Claimant repeatedly mentioned that Route 752 had been suitable and Mr Bishop made unequivocally clear that there were no longer any fixed routes, or route owners, and the Respondent was not going to implement an adjustment that the Claimant had such an arrangement.

225. To the extent that the Claimant seeks to rely on an argument that a fixed route could have been provided to him, time starts to run from (no later than) 8 December 2021, and expired (no later than) 7 March 2022. The ACAS conciliation commenced 15 April 2022, and thus the time limit had expired before the start of the conciliation period.

226. However, if we were wrong about that, then the latest date that the Claimant could argue that time ran from was 14 February 2022. For the reasons discussed above, there was no failure to make adjustments from 15 February onwards. Our decision is that there was no continuing act after that date. (We discuss, below, the complaint that we upheld; but that was a one off decision by a particular manager, and is a distinct and separate incident.)

226.1 If the clock started running from 14 February, then the primary time limit would have been 13 May 2022.

226.2 Early conciliation was 15 April to 26 May.

226.3 Had a claim been presented by 26 June 2022 (one month after the end of early conciliation) then that would have been in time.

227. A claim form was submitted on 23 June, which was prior to the deadline just mentioned. However, the contents of that claim form (including attachments) did not mention the particular PCP in question, or the disadvantage in question, or present a claim about alleged failure to make reasonable adjustments to this PCP.

228. The Grounds of Complaint which made those allegations was submitted, out of time, on 22 July 2022. As mentioned above, it was not until November that the amendment request was actually granted. However, the Respondent has not sought to argue that the November date should be treated as the presentation date.

229. As per Galilee v Commissioner of Police of the Metropolis [2018] ICR 634), the effect of allowing an amendment to a claim to allow a new complaint to be added does not have the effect that the new complaint is treated as having been presented on the date the claim form was received (in this case, 23 June 2022). Thus, even assuming, in the Claimant's favour, that the appropriate date is 22 July, the claim was 4 weeks out of time.

230. Thus the complaint that there was a failure to make adjustments between July 2021 and 14 February 2022 is out of time unless we decide, as per section 123(1)(b) EQA, that it has been presented within "such other period as the employment tribunal thinks just and equitable".

230.1 During the claimant's absence, the respondent did repeatedly inform the claimant that it was not going to be able to give him fixed routes at which met all of his requirements. It made clear that it perceived that his requirements included that any route allocated had to be within the same geographical location that the claimant had previously delivered to.

230.2 The claimant knew, during his absence, that 752 was not going to be reinstated and the respondent had said so expressly. The claimant knew that the respondent was making clear that it was not returning to the previous arrangements of fixed routes and route owners.

230.3 An error was made on 23 June. The Claimant submitted a document which had been drafted for his 2020 claim. He did not submit the document he had drafted for his 2022 claim [Bundle 49 to 50].

230.4 The document that he had intended to submit on 23 June is not the Grounds of Complaint which subsequently formed the basis of the amended claim. The new Grounds of Complaint was drafted by the Claimant's solicitors and bears the date 22 July 2022.

230.5 We accept that it was human error by the Claimant that he failed to present, on 23 June 2022, a complaint which alleged failure make adjustments from July (or August or September) 2021 onwards, as a result of a PCP implemented around that date. However, he did, in fact, fail to do so and that did, in fact, cause prejudice to the Respondent.

230.6 We have not been provided with any details of any documents that were allegedly lost or destroyed as a result of the delay. We think it unlikely that the Respondent would have discarded helpful documents in all the

circumstances, including the fact that there had been a previous claim from the Claimant and the fact that he had started a period of long term sickness. The Claimant had, for example, mentioned EQA when submitting his flexible working request in July 2021. The Respondent ought to have been on notice that there might be further litigation and that it might be sensible to retain documents where possible.

230.7 The Claimant had had legal representation in the past, and had union representation at all the relevant meetings. He was aware of his rights generally and of the existence of EQA in particular. The Claimant was aware of the right to present a claim to an employment tribunal. It has not been argued on the Claimant's behalf that he did not know about the existence of time limits and it has not been argued on the Respondent's behalf that the Claimant had sufficient knowledge or expertise to calculate an exact deadline.

230.8 The Claimant was well enough to attend meetings, and did so. The November OH report said he was well enough to return to work. There was no medical reason preventing him presenting a tribunal claim during the period of his September to February absence. Furthermore, on his return to work, he was well enough to present an informal request to Ms Nash in February, and a formal grievance in March. He was also well enough to in February and March 2022 to present a tribunal claim.

230.9 However, the disadvantage to the Respondent was that (on our assessment) it was required to discharge a burden of proof for the period from implementation of route rationalisation to 14 February 2022. (It was also required to do so for the period after that date, but we are satisfied it has done so for that period). We have not been shown sufficient evidence that there was a good enough reason to not have made a firm and unequivocal offer of the route discussed with the Claimant on 3 September; we have not been shown sufficient evidence that such an offer was unambiguously made. However, the discussions with Mr Bishop and Mr Shaw at this time were oral, and the two of them genuinely do not recall the details. Indeed, there was a genuine lack of recollection on their part about the precise dates when route rationalisation started. Had a tribunal claim been presented more promptly then Mr Bishop's and Mr Shaw's memories would have been fresher and that might have assisted the Respondent to discharge its burden. We cannot say that they would have been unable to give sufficiently clear, consistent and accurate evidence to persuade us that the burden had been discharged had the claim been presented in time.

231. We therefore consider that it would not be just and equitable to extend time.

232. Thus the entire reasonable adjustments claim set out at paragraphs 4 to 9 of the list of issues fails.

232.1 For the period from 15 February 2022 onwards, it fails because the Respondent has satisfied us that there are no further steps that it would have been reasonable for it to have had to take to seek to reduce or eliminate the disadvantage to the Claimant caused by the route rationalisation PCP.

232.2 For the period prior 15 February 2022, it fails partly because the Respondent has satisfied us that there were some particular additional steps which it would not have been reasonable for it to have had to take, and also because the claim for that period is out of time.

Indirect disability discrimination: paragraphs 13 to 18 of the list of issues

233. In relation to at the indirect discrimination complaint, we agree with the respondent that the claimant has not demonstrated group disadvantage. The Claimant has not provided evidence about an identified group of people sharing his protected characteristic and/or provided evidence that they were proportionately more likely to be disadvantaged by the route rationalisation than those who did not share the claimant's protected characteristic.

234. However, and in any event, we are satisfied that the respondent introduced route rationalisation to pursue a legitimate aim. It needed to meet customer needs and failing to do so would have resulted in the loss of customers. It had to deal with a driver shortage and route rationalisation was its attempt to do so.

235. Even if there was any group disadvantage, then we would have had to weigh the discriminatory effect of that disadvantage against the disadvantages to the respondent of not implementing route rationalisation.

236. Our assessment is that this policy was a proportionate means of pursuing a legitimate aim.

236.1 The Respondent introduced a system of reducing the days on which customers would receive deliveries and thereby reduced the possibility of failed orders.

236.2 This was less flexible for their customers, and we are satisfied that the Respondent would not have done it had it believed there was an acceptable alternative. However, by reducing the number of deliveries to a customer per week, the Respondent reduced the risk of having to unexpectedly cancel a planned delivery. The Respondent's assessment that giving less flexibility to customers (they could only choose how much to order on 3 days each week, instead of having the flexibility to spread their weekly requirements over 7 days) was less likely to lose them the customers' business than making promises that they could not keep.

236.3 Route rationalisation provided extra predictability for the customers (fewer unexpected cancellations), but at the expense of reduced predictability for the drivers.

236.4 Even assuming that the lack of predictability created a group disadvantage, it was proportionate to introduce this PCP because the respondent could not find a different way. Had agency drivers been available, it would have made greater use of agency drivers. Had new drivers been available, it would have recruited them. However, it had to maximise the customers that could be served by the drivers which it did have and route rationalisation was its best way of doing so.

Victimisation: paragraphs 23 to 25 of the list of issues

237. In relation to victimisation and there is no dispute that both the items in paragraph 23 of the list of issues were protected acts.

238. The first alleged detriment (paragraph 24a) is: "The Respondent's decision to issue the Claimant with a stage one AMP warning on 30 March 2022".

239. That did happen. The Respondent did make a decision (stated orally, and confirmed in writing) that the Claimant was to go onto Stage 1 of AMP. The Respondent takes issue with the Claimant's use of the word "warning". However, we think it is irrelevant that the specific word "warning" is not used in the text of AMP or the text of the letter. We quoted the relevant extracts from the letter in the findings of fact, as well as summarising the stages of AMP. The letter informed the Claimant that, if his attendance was not deemed satisfactory (over the 6 month monitoring period) then he might move to Stage 2. Stage 2 was not dismissal, but Stage 2 was a step closer to dismissal than Stage 1, and Stage 1 was a step closer to dismissal than not being on Stage 1.

240. Being put on Stage 1 was a detriment. Being on Stage 1 was a disadvantage for the employee compared to not having been placed on Stage 1 on 30 March 2022. We do take into account that Stage 1 was, among other things, an opportunity for employer and employee to have discussions, to consider OH referrals, and to identify adjustments that might help improve attendance. However, it would be possible to offer an employee those beneficial consequences without also informing the employee that if "*there has not been a significant and sustained Improvement In your attendance, you may be moved to the next stage In the Attendance Management Procedure*".

241. Our decision is that the burden of proof has not shifted as to whether this detriment was because of either protected act.

241.1 We take into account that the protected act would not have to be the main reason for the detriment. We also take into account that even an unconscious motivation would be sufficient.

241.2 However, we do not find this to be a surprising or suspicious sequence of events.

241.3 We accept the claimant was told on 15 February that there would be a review and that was before either of the protected acts in any event.

241.4 It is factually accurate that what happened to the claimant in February/March 2022 is different to what happened to him and when he returned to work in July 2021. In 2021, there was no decision to place him on Stage 1, and in March 2022, there was. In July 2021, there was no meeting under AMP at all; so there was not a meeting, followed by a specific decision that Stage 1 was not appropriate. Furthermore, Mr Marrese was not the decision-maker in July 2021.

241.5 Furthermore, while it is true that July 2021 was before the two particular alleged protected acts in paragraph 23 of the list of issues, July 2021 was not before the claimant had done various protected acts. For one thing, he had brought an employment tribunal claim alleging disability discrimination. For another, he had made a flexible working request asserting the right to a particular working pattern under EQA.

241.6 Our decision, having considered the AMP, it is that placing somebody on stage 1 is not an automatic consequence of hitting a trigger but rather it is a possible outcome. The policy does make clear (paragraph 10.3) that hitting a trigger means the employee "will normally be required to attend a Stage 1 Attendance Review Meeting". It is during the meeting that a decision is made. It follows that the decision might be that the employee is not placed on Stage 1, just as the decision might be they are placed on Stage 1.

241.7 There might be a variety of different reasons why there is no record of a meeting in July 2021, and no record of a decision that there would be no meeting. It might have been a lack of resources, or it might have been there were fewer Driver Operations Team Managers at the time, or it might have been that the team managers believed that their boss, Mr Shaw, had the matter in hand. Nobody seems to know. But what happened in February (that the Claimant was told there would be a meeting) and in March (that the meeting occurred) was the default position, and does not call for a further explanation than that. [The Claimant had been told by Ms Dean that if he did not return to work on the expiry of his fit note, the absence procedure might be implemented.]

241.8 Nor does the fact that the March 2022 decision was to place the Claimant on Stage 1 shift the burden of proof. There are no facts from which we might conclude the decision was because of the protected act. We have not even found that Mr Marrese was aware of the protected acts.

242. The second suggested detriment, 24b in the list of issues is: “The Respondent’s decision to refer the Claimant to Occupational Health again on 6 June 2022”.

243. It is true that Mr Armstrong suggested claimant would need to go to occupational health and that this was to assess capability. The perceived detriment from the claimant's point of view was that if a report came back which suggested he was not fit to drive, then that could be a very serious matter.

244. In a “but for” sense, as a matter of logic, if Mr Armstrong had not been dealing with the claimant's grievance, he would not have had any involvement in the matter and therefore would have made no comment on whether there should be an occupational health referral. However, analysis of a victimisation complaint does not require a “but for” test; it requires analysis of the reason why Mr Armstrong made the decision he did.

245. We are not persuaded, on the evidence that it was Mr Armstrong's intention to place at the claimant at a detriment but rather, it seems to us, that Mr Armstrong formed the opinion that there might need to be a more up-to-date occupational health report now that the claimant was back at work and was carrying out the duties which he described to Mr Armstrong.

246. In any event, it is not relevant in itself whether we think Mr Armstrong’s suggestion was reasonable or unreasonable; the reasonableness or otherwise is only relevant to the issue of what, if anything, it tells us about his motivation. We have to decide if there are facts from which we could conclude, that he was motivated (whether consciously or unconsciously) at least in part (to a more than trivial extent) by the protected acts.

247. Our decision is that the burden of proof that does not shift. To a large extent, Mr Armstrong gave the Claimant what he asked for with his grievance. Mr Armstrong awarded the Claimant back pay for the absence period. There is no evidence that he displayed animosity to the Claimant (whether because of the protected acts, or at all).

248. It is not inherently surprising or suspicious that Mr Armstrong thought there should be an up to date occupational health report in a situation where the evidence presented to him, including comments from the claimant, was about the Claimant’s need for reasonable adjustments, and the Claimant’s argument that the Respondent had failed to comply with its obligations to make reasonable adjustments (in the period of his sickness absence).

249. The victimisation complaints fail for both alleged detriments.

Discrimination arising from disability: paragraphs 19 to 22 of the list of issues

Failure to make reasonable adjustments to AMP: paragraphs 10 to 12 of the list of issues

250. In relation to the discrimination arising from disability complaint and paragraph 19 of the list of issues, we do find that the decision and letter dated 30 March 2022, amounted to unfavourable treatment.

250.1 The letter included within it, the instruction that the claimant could move to stage 2, if he did not improve his attendance. As the claimant was aware, AMP includes various stages, and Stage 2 was not the final stage, but was a stepping stone towards the later stages of the policy which could ultimately reduce at result in dismissal. Progression through the stages was not inevitable, but being placed on Stage 1 raised the possibility.

250.2 It was worse for the claimant to be on stage 1 than not be on stage 1; it was a disadvantage to him.

251. As per paragraph 20, the Claimant's 104 day absence was something arising in consequence of his disability, and the unfavourable treatment was because of that absence.

252. As per paragraph 22 of the list of issues, the legitimate aims asserted are: "… the need for employees to provide regular attendance at work and/or to record accurately absence levels among it employees and/or to support employees under the Attendance Management Procedure who may have absence"

253. We accept the Respondent did have those aims and that they were legitimate.

254. We take account of the respondent's arguments about why placing the Claimant on Stage 1 was a proportionate means of achieving a legitimate aim.

254.1 We do not accept that placing the claimant on stage 1 was a means of achieving the legitimate aim of recording absence.

254.2 However, we do accept it was a means of pursuing the other two legitimate aims.

255. There was a discriminatory effect on the claimant. We have to decide whether placing him on Stage 1 was proportionate in all the circumstances. (Paragraph 21 of the list of issues.)

256. For the reasonable adjustments claim, as per paragraph 10 of the list of issues:

256.1 The Respondent did have the PCP of "requiring employees to attend work to a certain level". If they did not achieve those levels, then being placed on Stage 1 was not inevitable.

256.2 The Claimant was disadvantaged by the requirement to have particular levels of attendance, in comparison with persons who are not disabled, because his disability caused high levels of absence.

257. The Respondent did know about the disadvantage we have just described.

258. The trigger points are set out in the policy.

258.1 However, AMP itself built into it a requirement for the manager making the decision to take into account the employee's disability, and HR advice, and potentially OH advice where appropriate. (Section 2.3)

258.2 The stages of the procedure set out in section 11 are summarised in the findings of fact.

259. We do not think it would be a reasonable step for the respondent to have to take to not apply this policy at all in the case of disabled employees.

260. We do not think it would be a reasonable step for the respondent to have to take to decide that all disability-related absence will always be ignored.

261. We do not think it would be reasonable step for the respondent to have to take to set trigger levels so high that they would not have affected the claimant. To achieve that, the trigger levels would have had to be in excess of 100 days.

262. It is reasonable for the respondent to have a policy in which managerial discretion will be used and there will be a decision on a case-by-case basis about whether to move to stage 1 (or to any other stage of the procedure). Our view is that the respondent already has such a policy, and it would not be a reasonable step for it to have to take to amend that procedure.

263. It would not be a reasonable adjustment for the respondent to have to make some other arrangement such that it was not possible for managers to issue stage 1 warnings at all in the case of disability-related absence. That would imply that disability-related absence would never lead to an employee moving through the stages of AMP, and eventually being dismissed. It would not be reasonable that an employer adjusted its policies to the extent that an employee could never be dismissed for absence if the absence was disability-related.

264. For the section 15 claim (and proportionality as per paragraph 21 of the list of issues), we do not have to rely on the Respondent's assessment. We do not apply a "band of reasonable responses" test. We perform the balancing test ourselves. We weigh up the importance to the Respondent of achieving the legitimate aim against the discriminatory effect on the Claimant, and we also consider whether there was any less discriminatory means of seeking to achieve the aim.

265. We have assessed the evidence for ourselves and reached a different decision to that which was made by the manager on 30 March 2022. In our judgment, it was not proportionate to place the Claimant on Stage 1, and to issue the Stage 1 letter.

265.1 The claimant could still have been told that his absence was going to be kept under review informally if he was not placed on stage 1.

265.2 Without being placed on stage 1 in March 2022, the Claimant could still have been told that further absences might lead to a decision being made to take into account the absence which finished on 15 February and treat later absence, plus that one, as meaning he had hit a trigger point. In other words, even if the decision was that the Claimant would not be placed on Stage 1 immediately, it did not follow that all the previous absence had to be written off, or treated as invisible, for the purpose of future decisions.

265.3 He could still have been told that there would be meetings to discuss the need for adjustments, without being on Stage 1. In fact, there was such a meeting on 15 February, even in the absence of the Stage 1 decision having been made.

265.4 In terms of proportionality, we take into account our own assessment and that the respondent has not discharged its burden of showing there was no additional adjustment at all that it would have been reasonable for it to have had to take prior to 15 February 2022.

265.5 We also note that the first new OH report during the absence was not until around 2 months after the absence started. That report stated that he was medically fit to return to work if adjustments could be made which satisfied the requirements set out in that (16 November) report.

266. We take into account that, on appeal, Mr Shaw decided that the Stage 1 monitoring period, and warning of potential move to Stage 2, should be cancelled.

267. However, despite the cancellation of the warning and it is our decision that it was not proportionate to put the claimant on Stage 1 on 30 March 2022 as there were less discriminatory measures that could have been taken.

268. Therefore, this claim succeeds. There was disability discrimination (within the definition in section 15 EQA) on 30 March 2022, when the Claimant was placed on Stage 1. The time limit, but for early conciliation, would have expired on 29 June 2022. However, adding on the 41 days for early conciliation means that the complaint, which was presented within the amended Grounds of Complaint received by the Tribunal on 22 July 2022, is in time.

REMEDY REASONS

269. The purpose of compensation is to provide proper compensation for the wrong which we found the Respondent to have committed. The purpose is not to provide an additional windfall for the Claimant and is not to punish the Respondent.

270. For financial losses, we must identify the financial losses which actually flow from complaints which we upheld. We must take care not to include financial losses caused by any other events, or losses that would have occurred any way.

271. For injury to feelings, we must not simply assume that injury to feelings inevitably flows from each and every unlawful act of detriment. In each case it is a question of considering the facts carefully to determine what, if any, injury has been sustained.

272. When making an award for injury to feeling, the tribunal should have regard to the guidance issued in Vento v Chief Constable of West Yorkshire Police (No 2) [2003] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318, CA, and taking out of the changes and updates to that guidance to take account of inflation, and other matters. Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, were identified:

    272.1 The top band. Sums in the top band should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment.

    272.2 The middle band is to be used for serious cases, which do not merit an award in the highest band.

    272.3 The lower band is appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. Awards in this band must not be so low as to fail to be a proper recognition of injury to feelings.

273. In Da'Bell v NSPCC (2009) UKEAT/0227/09, [2010] IRLR 19 the Employment Appeal Tribunal revisited the bands and uprated them for inflation. In a separate development in Simmons v Castle [2012] EWCA Civ 1039 and 1288, [2013] 1 WLR 1239, the Court of Appeal declared that - with effect from 1 April 2013 - the proper level of general damages in all civil claims for pain and suffering, would be 10% higher than previously. In De Souza v Vinci Construction (UK) Ltd [2017] EWCA Civ 879, the Court of Appeal ruled that the 10% uplift provided for in Simmons v Castle should also apply to Employment Tribunal awards of compensation for injury to feelings and psychiatric injury.

274. There is presidential guidance which takes account of the above, and which is updated from time to time. The relevant guidance applicable to this claim states:

> In respect of claims presented on or after 6 April 2022, the Vento bands shall be as follows: a lower band of £990 to £9,900 (less serious cases); a middle band of £9,900 to £29,600 (cases that do not merit an award in the upper band); and an upper band of £29,600 to £49,300 (the most serious cases), with the most exceptional cases capable of exceeding £49,300

Analysis

275. In this case, there is no financial loss flowing from the only complaint which we upheld.

276. We have taken account of all the evidence that we have heard about injury to feelings. We have taken account of the fact that the Claimant's disability is Generalised Anxiety Disorder and we accept that that means that being placed on Stage 1 (with the consequent concern about whether that would, in due course, lead to moving up through further stages of AMP) would cause a greater injury to his feelings than the same act might have caused to someone without the same disability.

277. When the Claimant received the Stage 1 decision on 30 March 2022, and the warning as set out in the letter, the effects on the Claimant included that, while he knew that dismissal was not the next stage in AMP, he became concerned about the possibility that his disability could lead to his dismissal. AMP did include appeal rights, but only at two particular points: the first was to appeal about being placed on AMP monitoring (so Stage 1, in the Claimant's case); the second was against dismissal. There was no opportunity for intermediate appeals, such as about going from Stage 2 to Stage 3, etc. Thus there was a period after the Claimant was told that he was on Stage 1 during which he knew that (if his Stage 1 appeal was unsuccessful) then he might remain in AMP for a long period of time and might be dismissed, without a further opportunity to appeal (until after dismissal).

278. As AMP made clear, and as the Claimant was aware, there was the possibility that if his attendance was satisfactory during the monitoring period, then that would be the end of the matter. He would exit AMP. However, there was also the possibility that, if his attendance was not satisfactory, he would move to Stage 2, etc. If his attendance after February and March 2022 was not satisfactory, then he would potentially reach Stage 2 (and the later stages) more quickly given the 30 March 2022 decision, than if the decision that day had been that he would not be placed, on that date, on Stage 1.

279. We take into account that the Claimant was aware of the successful appeal from around 1 July 2022 (albeit he did not receive written confirmation until September).

280. There is no specific medical evidence about the effects of the warning itself on the Claimant. When we assess his injury to feelings about the warning, we have to take into account that part of the injury was caused by the Claimant's belief that the warning amounted to victimisation, and that is a complaint which we have rejected.

281. Similarly, we also have to make sure to disregard any injury to the Claimant's feelings caused by the other matters which he has complained about in this claim, as those complaints were not successful.

282. The Claimant has not sought to argue for an award that is in the middle or upper Vento bands. Our assessment is that an award in the lower Vento band is appropriate. We are satisfied that, while there was an injury to feelings, it was not long lasting.

283. Our assessment is that an award towards the bottom of the lower band is appropriate. However, the injury was not minimal, and an award at the very bottom (around £990) would be too low.

284. Our decision is that £2000 is the appropriate amount.

285. We award interest for the period 30 March 2022 to 22 February 2024 which is 695 days. We award it at 8% per annum. Therefore, the calculation of interest is £2000 x 0.08 x 695/365. The award is £304.66.

Employment Judge Quill

Date: 2 April 2024

REASONS SENT TO THE PARTIES ON
2 April 2024

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FOR EMPLOYMENT TRIBUNALS